(14)

No. 04-473

Supreme Court, U.S.
FILED
JUL 22 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,
Petitioner,

v.

RICHARD CEBALLOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBERT H. CHANIN
JEREMIAH A. COLLINS
(Counsel of Record)
LAUREN J. MCGARITY
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,* on behalf of the National Education Association (NEA), a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed as teachers in public schools and colleges throughout the United States.

To teach is to communicate—often on matters of the greatest public importance and controversy. Consequently, the proposition advanced by Petitioners and their *amici*, under which a public employee's speech never can qualify for First Amendment protection if the employee engaged in the speech as part of his or her job duties, would have a devastating impact on teachers.

Consideration of the nature of public school teaching and of the interests of students, teachers, school officials and society at large in fostering "that free play of the spirit which all teachers ought especially to cultivate and practice," *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring), demonstrates that the rule advocated by Petitioners is analytically unsound and at war with basic First Amendment principles.

NEA therefore submits this brief to show that, for teachers and for public employees generally, the question whether job-related speech on a matter of importance to the public is protected against retaliatory employment action should continue to be governed by the balancing test laid out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), rather than by the absolute rule urged by Petitioners under which such retalia-

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* Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

tion would be permitted even in the absence of any legitimate governmental interest to support it.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Pickering*, 391 U.S. at 574, this Court held that "statements by public [employees] on matters of public concern must be accorded First Amendment protection." Subsequently, in *Connick v. Myers*, 461 U.S. 138, 147 (1983), this Court clarified that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," such speech is not protected by the First Amendment.

Petitioners argue that "a public employee's purely job-related speech, expressed strictly pursuant to the duties of employment," never can qualify for First Amendment protection, no matter how great may be the public importance of the subject matter. *See* Petitioners' Brief ("Pet. Br.") at i. Petitioners' attempt to find that rule in the language of *Connick* and subsequent decisions fails on its face, and we see no need to add to what Respondent will demonstrate in that regard.

Rather, we will address the three principal substantive contentions that are advanced by Petitioners and their *amici* in support of the rule they have proposed. Those contentions are, *first*, that a public employee's speech in the course of performing the functions of his or her job constitutes "government speech," Pet. Br. at 31, and does not entail any personal expression that could trigger First Amendment protection; *second*, that the interests of government as employer require an absolute rule that denies First Amendment protection to any and every instance of "job-related" speech; and *third*, that the rule advocated by Petitioners and their *amici* would comport with this Court's decisions concerning "the analogous issue of restrictions on government-funded speech," Brief for the United States ("U.S. Br.") at 19.

Focusing on the category of public employees that provides perhaps the clearest illustration of the flaws in those contentions—public school teachers—we will show, *first*, that speech by public employees in the course of performing their jobs that addresses issues of public concern often constitutes personal expression warranting First Amend-ment protection; *second*, that all legitimate interests of the government in restricting or punishing such speech in any particular instance are properly taken into account through the *Pickering* balancing test, such that no categorical rule is justified; and *third*, that this Court's decisions in the government-funding cases do *not* stand for the proposition that a recipient of funds has no First Amendment interest in speech, but only for the proposition that the recipient has no right to divert the funds to uses and purposes other than those for which the funds were provided.

Thus, speech by public employees in the course of performing their job functions that addresses issues of public concern is entitled to First Amendment protection unless, evaluated through the *Pickering* test, the First Amendment value of the speech is outweighed by legitimate governmental interests that are harmed by the speech.

ARGUMENT

I. SPEECH BY PUBLIC EMPLOYEES, INCLUDING IN PARTICULAR BY TEACHERS, ON MATTERS OF PUBLIC CONCERN, EVEN IF EXPRESSED IN THE COURSE OF AN EMPLOYEE'S PERFORMANCE OF JOB FUNCTIONS, INVOLVES PERSONAL EXPRESSION THAT IS ENTITLED TO FIRST AMENDMENT PROTECTION, UNLESS THE SPEECH IMPEDES THE PERFORMANCE OF THE EMPLOYEE'S DUTIES OR OTHERWISE INTERFERES WITH LEGITIMATE GOVERNMENTAL INTERESTS

It is common ground in this case that a public employer does not violate the First Amendment by punishing an employee for speech, even on a matter of public concern, if the employee's First Amendment interest in the speech is outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The matters to be taken into account in making that determination include such "pertinent considerations [as] whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

The question presented in this case is whether there is a class of speech—described by Petitioners as "purely job-related speech, expressed strictly pursuant to the duties of employment," Pet. Br. at i, and described in a variety of other

ways by Petitioners' *amici*,[1]—which is entitled to no First Amendment protection even if (as is the case here) the subject matter of the speech is of great public importance, and even if (as is also the case here) the employer has not identified any respect in which the speech adversely affected "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568.

Petitioners argue that such a categorical denial of First Amendment protection is warranted because speech in which an employee engages in the course of performing his or her job duties necessarily constitutes "government speech," Pet. Br. at 31, lacking any element of personal expression.

If there are any circumstances in which that might be a fair and cogent characterization of the nature of a public employee's speech on a matter of public concern, this is not one of them. Here, as in many public employment contexts—of which public education provides a particularly good example—employees regularly advance their own ideas, and

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[1] The United States refers to "speech by a public employee that touches on a matter of public concern but is expressed strictly pursuant to the duties of employment," U.S. Br. at I, without mentioning Petitioners' additional qualification that the speech be "purely job-related." In contrast, the International Municipal Lawyers Association (IMLA) argues that all "job-related speech," not just "purely on-the-job speech," should be denied First Amendment protection. IMLA Br. at 4. The inability of Petitioners and their *amici* to agree on a clear definition of the category of speech they are seeking to exclude from First Amendment protection is itself an indication that their various positions lack any firm doctrinal basis. Because Petitioners' argument is principally focused on the situation in which a public employee's job requires the employee to engage in speech and the employee is punished for the content of the particular speech in which he or she thereby engaged, this brief likewise will focus on that situation, and will not address other contexts in which employee speech might be characterized as "job-related."

are expected to do so, in the course of performing their job functions.

A. As this Court explained in *Ambach v. Norwick*, 441 U.S. 68, 78 (1979):

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. . . . In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. *No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals* (emphasis added).

One need only reflect for a moment on the teaching of social studies, literature, philosophy, science and a host of other subjects to recognize that, in teaching a particular subject matter as well as in imparting values of citizenship to students, teachers function without a script, and must draw upon their own opinions as to what is important and what is true, whether it be with respect to the causes of the Civil War, the calls for impeachment of Presidents Andrew Johnson, Richard Nixon or Bill Clinton, the science of global warming, or the treatment of religion in Chaucer, Shakespeare or Milton.

To be sure, to the extent that school authorities make judgments regarding the curricula to be taught and the materials to be assigned to students, or regarding how particular controversial issues are to be addressed, teachers are required (with only very narrow exceptions) to conform to those decisions. *See infra* at 15 & n.4. But the fact of the matter is that school authorities frequently choose to make curricular decisions only at a level of broad generality, and call upon each

individual teacher to determine, within those broad outlines, what actually will be covered and assigned in class. So too, it is rare for school authorities to give teachers directives, or even guidance, as to what to say or not to say about a potentially controversial topic that might arise out of the subject matter of a course. Indeed, school authorities often have no view—much less any view that teachers are directed to follow—as to what is the right or wrong way to teach a particular controversial subject. Far from wanting teachers to read from a script, school authorities expect and desire that teachers will resolve such matters for themselves in the first instance. This leaves ample room for teachers to draw upon and express their own ideas and understandings as to matters of public concern. Indeed, school authorities *expect* a teacher to do this, as long as the teacher adheres to any established curricular requirements and exercises what the school authorities deem to be sound professional judgment.

It therefore would be the purest fiction to assert that a teacher who, in instructing a class, speaks on controversial matters of public concern, has no personal stake in what he or she is saying. Whatever may be the limits of a teacher's First Amendment rights in this regard, *see infra* at n.4, it is impossible to read what this Court has said about the First Amendment value of "that free play of the sprit which all teachers ought especially to cultivate and practice," *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), and yet maintain that publicly employed teachers have no First Amendment interests in their teaching. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("[I]n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation."); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic

freedom, which is of transcendent value to all of us and not merely to the teachers concerned.").

B. Another area in which Petitioners' proposed distinction between "job-related speech" and "personal" speech is an artificial one is when teachers speak up to protect or promote the well-being of their students. Teachers—particularly the best teachers—acquire a genuine personal interest in their students' safety, and in the quality of the education their students receive. Teachers are not expected to sit silent when they become aware of matters that are harming their students. As this Court recently pointed out, "teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are 'the only effective adversar[ies]' of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.*, 125 S.Ct. 1497, 1508 (2005).

Speech by a teacher reporting instances of harm to students—including harm that may be attributable to school policies or programs—often does (and sometimes must) occur in the course of the teacher's performance of his or her regular job functions, but this does not alter the fact that, when speaking out in this context, a teacher is speaking *to* the government, not *as* the government, and (quite properly) is expressing his or her own views, not necessarily those of the government.[2] In sum, it defies reality to assert that when

[2] A good illustration of this point may be found in the Fourth Circuit's decision in *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004). Love-Lane, an African-American assistant principal at an elementary school, complained in a variety of forums about disciplinary policies and practices that disproportionately disadvantaged African-Americans. When her attempts to broach this subject with the school's principal were rebuffed, Love-Lane raised her concerns at faculty meetings and at meetings of a "School Improvement Team" comprised of administrators, teachers, and parents. Love-Lane subsequently received a negative evaluation from the principal, and was demoted to work at another school in a non-

teachers speak on matters of public concern in the course of performing their jobs they necessarily are speaking only as script-readers for the government. Rather, in situations such as the ones we have described (and the one presented in this case), an employee's speech on a matter of public concern has the same First Amendment value when expressed in the course of performing his or her job functions as it would have if expressed in another context. As the Sixth Circuit aptly put it in *Cockrel v. Shelby County School District*, 270 F.3d 1036, 1052 n.5 (6th Cir. 2001), "the very nature of [a public school teacher's] profession entails that her speech on matters of

administrative position. She challenged these adverse actions as a violation of her First Amendment rights. The court found that Love-Lane's complaints about racial discrimination in the school's disciplinary practices addressed a matter of public concern, and that Love-Lane's broaching of these issues in discussions with her supervisors, at faculty meetings, and in the context of her role on the "School Improvement Team" did not remove her speech from the protections of the First Amendment. *Id.* at 777. Although it was part of Love-Lane's job to communicate with her supervisors, to attend faculty meetings, and to work on the "School Improvement Team," the Fourth Circuit properly did not view that fact as depriving Love-Lane of a protected First Amendment interest in speaking out in those forums to rectify racial discrimination in the educational system.

Similarly, courts have found public school teachers to have legitimate First Amendment interests in the content of their speech, however job-related, when they complain to supervisors about a lack of resources for a special education program, *see Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004), or when they report a colleague's inappropriate touching and sexual harassment of students to supervisors and include such reports in the colleague's regular annual evaluation, *see Cromley v. Board of Educ. of Lockport Township*, 699 F. Supp. 1283 (N.D. Ill. 1988). Such cases involve conduct that is clearly related to, and at least in part required by, the employee's job duties, but the courts properly have not viewed this as negating the protected First Amendment interest of the teachers in the messages they convey on such matters of public importance.

political and social interest is likely to be made both as an employee and as a citizen."

II. ALL LEGITIMATE INTERESTS OF A PUBLIC EMPLOYER WHICH MIGHT PROVIDE THE BASIS FOR TAKING ADVERSE ACTION AGAINST AN EMPLOYEE FOR SPEECH ON A MATTER OF PUBLIC CONCERN ARE TAKEN INTO ACCOUNT IN APPLYING THE *PICKERING* BALANCE, AND THERE IS NO JUSTIFICATION FOR THE CATEGORICAL RULE PROPOSED BY PETITIONERS, WHICH WOULD CHILL SPEECH THAT POSES NO THREAT TO ANY GOVERNMENTAL INTEREST

There unquestionably are instances in which speech by a public employee, even on a matter of great public importance, may be made the basis for adverse employment action because of the impact of the speech on legitimate governmental interests. It is the office of the *Pickering* balancing test to address that point by providing for a full and fair weighing of the public employer's proffered reasons for punishing employee speech, including specifically the employer's interest in workplace discipline and proper working relationships and in preventing speech that "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388.

Petitioners and their *amici* offer no sound reason why, in instances when an employee's speech on a matter of public concern is expressed in the course of performing job functions, a proper "accommodat[ion of] the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment," *id.* at 384, cannot be achieved—as in other public employee First Amendment cases—through application of the *Pickering* balance, rather than through a categorical rule that denies

protection to the speech no matter what public importance the speech may have, and no matter how weak or non-existent may be the countervailing legitimate interests of the employer.

The absence of any persuasive reasoning on this point in the briefs of Petitioners and their *amici* is glaring. For example, the brief of *amicus* National School Boards Association ("NSBA") speaks of the need to punish speech by teachers "who refuse to execute their responsibilities in the manner prescribed by the school board," NSBA Br. at 3, who are not "willing to fulfill the mission of the public employer in the manner which the public employer prescribes," *id.* at 9, whose "speech reflects unwillingness to conform to the expectations of the employer," *id.* at 10, and who would "supplant[ ] a school's policy choices with the teacher's own," *id.* at 19. NSBA admits, however, that it is "likely" that the kinds of teacher speech it finds objectionable "would not be constitutionally protected under the balancing test described in *Pickering*." *Id.* at 20-21. Yet NSBA, like Petitioners and their other *amici*, argues for a rule that would allow public employers to punish not only the kinds of insubordinate speech described by NSBA, but also speech that is not shown to have been contrary to any rule, or even to any legitimate *interest*, of the employer.

Attempting to make that bitter pill go down more easily, NSBA writes as if the position Petitioners are urging would allow school authorities to take action against a teacher for speech only "so long as [the authorities'] actions are reasonably related to legitimate pedagogical concerns." *Id.* at 14-15, quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).[3] *See also* NSBA Br. at 15 (stating that school authorities should be allowed to impose "reasonable

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[3] Noting that *Hazelwood* involved student speech, NSBA states that "the same principles that govern a school's ability to control student speech would also apply to employee speech that might be seen to bear the imprimatur of the school." NSBA Br. at 15.

restrictions on the speech of . . . teachers") (*quoting Hazelwood,* 484 U.S. at 267, *and citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983)). Yet it cannot be gainsaid that the categorical rule proposed by Petitioners would allow punishment for speech even in the *absence* of any "legitimate pedagogical interest" or any "reasonable restriction."

To the extent that Petitioners and their *amici* even acknowledge the sweeping nature of the rule they propose and make any effort to justify the breadth of such a rule, their arguments boil down to two related contentions: (1) that a rule allowing punishment even of speech that does *not* disserve any legitimate governmental interest is justified as a means of making absolutely certain that there will never be a case in which a court (by erring in its application of the *Pickering* balancing test) might allow speech that *does* disserve governmental interests to escape punishment; and (2) that the courts should not be called upon to determine whether a particular instance of retaliation for employee speech is or is not justified by legitimate governmental interests because this entails litigation costs for public employers.

Those proffered justifications for throwing the First Amendment baby out with the bathwater ignore the grievous harm that would be caused to our democracy if, as Petitioners would have it, public employers were free to punish employees for speech on matters of public importance even where the employer cannot establish any legitimate basis for such punishment.

As this Court said in *Rankin*, in rejecting arguments that a Constable's office should not be required to justify the speech-based discharge of the plaintiff employee in that case:

> [T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.

483 U.S. at 384 (internal citation omitted).

In public education, the danger that a teacher may be subjected to retaliation for speech that did not in fact "hamper[ ] public functions," *id.*, arises not only where "*superiors* disagree with the content of employees' speech," *id.* (emphasis added), but also where members of the community put pressure on school authorities to punish a teacher for speech that the school authorities themselves do not necessarily believe to have been improper. As Judge Kaufman wisely wrote, because school authorities are subject to such community pressure, "[t]he dangers of unrestrained discretion are readily apparent. Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression." *James v. Board of Educ. of Cent. Dist. No. 1*, 461 F.2d 566, 575 (2d Cir. 1972).

The list of reported cases in which public school authorities have caved in to pressure from vocal members of the community, where the authorities had no good faith reason to believe that a teacher's speech had in fact been objectionable, is dishearteningly long. To give but a few examples:

> —In *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), *rev'd in part on other grounds,* 477 U.S. 299 (1986), a teacher was punished as a result of community uproar over his use of a life science curriculum *that the administration had approved.*
>
> —Similarly, in *Cockrel v. Shelby County School District*, 270 F.3d 1036 (6th Cir. 2001), a teacher was fired when a community uproar developed over the visit of a controversial figure whom the teacher had invited to the school *with the explicit approval of the principal.*

—In *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), a community college instructor presented a "lecture on language and social constructivism, where the students examined how language is used to marginalize minorities and other oppressed groups in society [, which] included a discussion and analysis of words that have historically served the interests of the dominant culture in which they arise." *Id.* at 674-75. Hardy "solicited from his students examples of such terms," and the students gave examples including the words "girl," "lady," "faggot," "nigger," and "bitch." *Id.* at 675. One student complained about the class to "a local civil-rights activist," *id.*, who—plainly having been misinformed as to the nature of the class discussion—met with the college president to say "that he would not allow our kids to come to an institution and be berated with the 'N' word and the 'B' word," *id.* After informing the instructor "that a 'prominent citizen' representing the interests of the African American community had become involved and had threatened to affect the school's already-declining enrollment," *id.*, the college terminated the instructor solely to placate the misinformed activist. *See id.* at 681, 682.

Not to belabor the obvious, the categorical rule proposed by Petitioners—which would deprive public school teachers of First Amendment protection even in "scapegoat" situations such as *Stachura, Cockrel* and *Hardy*—would give school authorities free rein to punish speech even in situations where that result cannot be supported by any sound constitutional analysis.

There is no need for this. No showing has been made that the *Pickering* balancing test is incapable of properly accommodating public employers' interests in cases of this kind. That test properly effectuates the right of public employers "to discipline workers whose speech interferes with the[ ] goals" of "maintain[ing] the efficiency as well as the integrity of [the] office." *Rankin*, 483 U.S. at 393 n. * (Powell, J., concurring).

To whatever extent the employer's interests may be stronger in a case of speech-in-the-course-of-job-functions than in other cases, the *Pickering* balancing test can take this into account. We fully agree with the United States' assessment that "it will ordinarily be more difficult for the employee to prevail at the second step of the *Pickering-Connick* inquiry when the speech is expressed in the course of the employee's duties," and that when "an employer can show that, in saying or writing the things at issue, the employee was performing his duties inadequately or inappropriately, that showing should be sufficient to defeat the constitutional claim." U.S. Br. at 28-29. But that simply goes to show that the *Pickering* balance will produce proper results in this as in other contexts.[4] It is *not*

[4] Thus, for example, if a teacher neglects parts of the required curriculum because he or she devotes excessive class time to discussing social issues of importance to the teacher, *Pickering* will defeat a First Amendment claim. *See Scallett v. Rosenblum*, 911 F. Supp. 999, 1015-17 (W.D. Va. 1996) aff'd, 106 F.3d 391 (4th Cir. 1997) (table). In the same vein, although a teacher's decisions as to curriculum and teaching methods can involve matters of public concern warranting First Amendment protection, "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques *in contravention of school policy or dictates*." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (emphasis added). This not to say that school officials have unlimited authority to dictate teachers' speech. "[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom," *Keyishian*, 385 U.S. at 603; and "no [Government] official, high or petty" may "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). We therefore agree with NSBA that this Court's decision in *Hazelwood*, although it addressed student speech rather than teacher speech, indicates that restrictions on teacher speech also must be "reasonably related to legitimate pedagogical concerns." *See supra* at 11 & n.3. But, except in the very rare case, these principles will mean that a teacher who fails to conform to pedagogical judgments of the school authorities—the kind of teacher described in NSBA's brief—will not be able to prevail on a First Amendment claim because the *Pickering* balance would defeat the claim.

an argument for *dispensing with* the *Pickering* balance and adopting a categorical no-protection rule.

An interpretation of the First Amendment that permits educators to be fired for speech related to a matter of public concern even where the speech is consistent with legitimate pedagogical goals and school policies and is in no way disruptive of the educational process would have a severe chilling effect on the willingness of teachers to discuss current events or controversial issues in the classroom. As this Court has recognized, when expression of controversial ideas may subject a teacher to punishment, teachers will be compelled to "stay as far as possible from utterances or acts which might jeopardize [their] living." *Keyshian*, 385 U.S. at 601. A rule excluding from First Amendment protection all speech that is expressed in the performance of job functions would place teachers—particularly non-tenured teachers—in an extremely vulnerable position. In order to protect their jobs, such teachers would be inclined to avoid any methodological innovation or enrichment of the prescribed curriculum, and any discussion of controversial topics or current events. To take a timely example, it is difficult to conceive of a classroom discussion of the causes of the current conflict in Iraq that would not offend the sensibilities of at least one parent or community member. If Petitioners' proposed rule were the law, a teacher concerned about his or her long-term employment prospects would be well-served to avoid such a topic altogether, despite its significant educational value. Similarly, such teachers would be discouraged from reporting mistreatment of students, for fear that their speech might subject them to retaliation by a disapproving administration.

No constituents of the public educational system—neither students, nor teachers, nor school officials, nor the community—would benefit from such a chilling effect on teachers. "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free

mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

III. THIS COURT'S DECISIONS CONCERNING GOVERNMENTALLY-FUNDED SPEECH DO NOT SUPPORT PETITIONERS' POSITION

Petitioners and the United States attempt to find support for their position in the line of cases, exemplified by *Rust v. Sullivan*, 500 U.S. 173 (1991), in which this Court has considered the First Amendment rights of recipients of governmental funding. *See* Pet. Br. at 32-34; U.S. Br. at 19-21. To the extent that the issue in such cases is "analogous," U.S. Br. at 19, this Court's decisions do not lend any support to the position Petitioners and their *amici* are advocating here.

In *Rust*, the Court held that, where the Federal Government had provided funds to subsidize family planning services that will lead to conception and childbirth, and had declined to allow the use of the funds to promote or encourage abortion, clinics and doctors who received the funds had no First Amendment right to use the funds to provide abortion counseling and referral. Because the government could constitutionally "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds," 500 U.S. at 192-93, quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977), the fact that speech was involved did not give recipients of the funds a First Amendment right to use the funds for a purpose outside of—and indeed contrary to—the purpose for which the government had made the funds available. *See also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates public funds to promote a particular policy of its own," the government may "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee").

In the context of public employment, the principle that is analogous to the holding in *Rust* is that public employees do not have a First Amendment right to engage in speech in the course of performing their job duties *that is at odds with the employer's legitimate decision as to what message should be conveyed*. As we have explained, the *Pickering* balance embodies that very principle. *See supra* at 15 and n.4. But, nothing in *Rust* or *Rosenberger* suggests that an individual who is using government funds when he speaks has, for that reason, no First Amendment rights even when engaged in speech that is *not* outside of, or contrary to, the bounds that have legitimately been set by the government.[5] Hence, the government-funding cases do not support the kind of categorical rule that is proposed by Petitioners and their *amici*.

CONCLUSION

There is, quite simply, no basis and no need for a categorical rule excluding teachers and other public employees from the protections of the First Amendment while performing their job functions. The government's interests in the effective job performance of public employees and the efficient performance of governmental operations is adequately protected by the appropriately nuanced inquiry of the *Pickering* balancing test. In contrast, to suppress public employee speech on a matter of public concern in the absence of any legitimate interest justifying such suppression, merely because the speech took place in the course of the employee's

[5] Indeed, *Rust* indicates that even the limited degree of control over government-funded speech approved by the Court in that case would not necessarily be supportable in every context, including some educational contexts. *See Rust*, 500 U.S. at 200 (*citing Keyishian*, 385 U.S. at 603, 605-06). *Cf. Polk County v. Dodson*, 454 U.S. 312, 322 (1981) (recognizing that public defenders are employed with the assumption that they will be "free of state control").

performance of job functions, would be inimical to basic First Amendment principles.

Respectfully submitted

ROBERT H. CHANIN
JEREMIAH A. COLLINS
(Counsel of Record)
LAUREN J. MCGARITY
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
(202) 842-2600